In the Supreme Court of the United States.

OCTOBER TERM, 1894.

JOHN ANSBRO, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 945.

MOTION TO ADVANCE.

The plaintiff in error (the captain of a tugboat which was towing mud scows to sea) was indicted under the act of June 29, 1888 (25 Stats., 209), for dumping prohibited matter in the harbor of New York at points not within the limits specified in his dumping permit. He was convicted, and sentenced to imprisonment for six months. He is now out on bail, in the sum of $1,500, awaiting the decision of this court on his writ of error.

This is one of a number of prosecutions now pending, involving similar questions.

The Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on such day during the next term as may be convenient to the court.

Notice of this motion has been served on the counsel for the plaintiff in error, and proof thereof filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

JOHN ANSBRO,
Plaintiff in Error,
vs.
THE UNITED STATES,
Defendant in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts

This is a writ of error to review a judgment of the Circuit Court of the United States for the Southern District of New York, imposing a sentence of six months' imprisonment upon John Ansbro, plaintiff in error, for a violation of the Act of Congress, approved June 29, 1888, entitled "An Act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York city by dumping or otherwise, and to punish and prevent such offenses."

The statute comprises six sections. Section 1 provides that the *discharge or deposit* of mud or other specified matter in the harbor of New York or adjacent waters *within the limits which shall*

be prescribed by the Supervisor of the Harbor, is forbidden, and every such act is made a misdemeanor, and every person who is engaged in or who shall aid, abet, authorize or instigate a violation of this section shall, upon conviction, be punished by fine or imprisonment, &c., &c.

Section 2 provides that every master and engineer on board of any boat or vessel who shall *knowingly engage in towing* any scow loaded with any such prohibited matter to any point of deposit or discharge in the waters of the harbor of New York or adjacent waters, or *to any point or place elsewhere than within the limits defined and permitted* by the supervisor of the harbor, shall be deemed guilty of a violation of this act.

Section 3 provides that where such prohibited matter is received on board a scow the owner or master thereof shall, before taking the same to the place of deposit, obtain from the supervisor of the harbor, a permit *defining the precise limits within which the discharge of such scows may be made;* and any deviation from such dumping place, so specified, shall be a misdemeanor. *And the master and engineer of any tow boat towing such scow shall be equally guilty with the master of the scow.*

Section 4 provides that all such matter shall be deposited and discharged *at such place or within such limits as shall be defined and specified by the supervisor of the harbor as in the third section of this act prescribed*, and not otherwise; and makes the owner of any slip from whence dredgings are taken, responsible for discharge thereof at the proper place, and punishes every violation of this section by a fine. The vessel engaged in such

violation is also made liable to such fine. Section 5 provides for the appointment of a supervisor of the harbor, by the President. Section 6 makes an appropriation.

The second count of the indictment, under which plaintiff in error was convicted and sentenced, recites the acts prohibited in Section 1, the appointment of a supervisor of the harbor, as provided by Setion 5, the provisions of Section 3, and the issuance of a permit thereunder, and notice thereof to plaintiff in error. That on May 1, 1894, plaintiff in error, as master of the steamtug "P. H. Wise" received from the supervisor of the harbor a permit to take two scows loaded with mud to the "Mud buoy" and there deposit it. (Section 3 of the Act.) That plaintiff in error was master of said steamtug "P. H. Wise" "which was knowingly engaged, used and employed" by him (section 2 of the Act,) and that the mud and other matter was "unlawfully and knowingly dumped, placed, discharged and deposited into the tidal waters of the harbor of New York, etc., *from said two scows or dumpers, by direction of the said John Ansbro,* (Section 1 of the Act,) as such master of such steam vessel P. H. Wise," etc. (Section 3 of the act). That such place of discharge was not at the dumping place specified in said permit, "*but deviated therefrom,*" (section 3 of the act), as he well knew, in violation of the statute.

The supervisor of the harbor has never fixed the limits within which dumping is probibited. He caused a white spar buoy to be placed at a point in the lower Bay of New York, one and a half miles south of Coney Island, on certain ranges and with certain bearings by compass (Fremont 47).

This was called the "mud buoy," and the permits issued by him had printed upon their reverse side the location of this buoy, and the statement that "the deposit of all dredgings, etc., shall take place south and east, and within half a mile of what is known as the "mud buoy" (Exhibit 1, fol. 95). The buoy is near shoals known as "Romer Shoals," and is reached from New York through the upper or Coney Island channel by vessels of ordinary draft, while vessels of deeper draft, loaded, are obliged to go down by the east channel, the mouth of which is to the southward of the buoy. They then swing back towards New York to pass the buoy, returning to New York, light, on the young flood tide, by the upper or Coney Island channel (Fremont, 51, 54; Vandecar, 59, 63; Ansbro, 74).

No buoy or other marker of any kind was set to define the limits of the dumping ground, and no ranges or bearings were given by which the navigator could fix the boundaries of the dumping ground, or tell where the half-mile limit was (Fremont, 47, 48, 57).

On May 1, 1894, John Ansbro, master of the tug "P. H. Wise," took in tow two loaded mud scows, on a hawser of about 150 fathoms in length, astern (Fremont, 54), under a permit from the Supervisor of the harbor. He went down the east channel, swung around towards New York, after emerging from it, passed the "mud buoy" and returned to New York. The scows were dumped or discharged at some point between the East Channel and the mud buoy, variously estimated by different witnesses at from one quarter of a mile to over two miles. They were dumped by opening the doors in the bottom of the scows

by means of a chain wound around a shaft, worked from the deck of the scow by the master of the scow. The mud then dropped out (Fremont, 54). The scow nearest the tugboat was from nine hundred to one thousand feet astern of her (Fremont, 54). No signal was given by Ansbro to the person on the scow, notifying him to dump the scow, so far as appears from the record; and, in fact, the only man on the government vessel who was watching the *P. H. Wise*, expressly states that he heard no signal and did not see any steam from the whistle pipe of the *Wise*, and could not say whether she signaled to her tow or not (Vandercar, 62). No person, either on board the *Wise* or her scows or the government vessel testified that Ansbro gave any signal or orders to dump the scows at any time.

POINTS.

I.

The Court was without jurisdiction to try the case.

(*a.*) If the testimony for the United States was true, then the dumping took place more than three and one-half miles from shore, outside of the international three-mile limit, and outside the jurisdiction of the United States.

The mud buoy was placed one and one-half miles from Coney Island (Permit Ex. 2, fol. 97), which is the southerly shore of Long Island and is washed by the Atlantic Ocean. Both Fremont and Van-

dercar say that the dumping took place more than two miles further south (Fremont, 43, 45; Vandercar, 59; Ex. 2, fol. 94). This would make more than three and one-half miles. As the offense was committed without the jurisdiction of the United States, the Courts of the United States had no jurisdiction of the matter whatever.

(*b*) The trial should have been had in the Eastern District of New York, if at all.

By the sixth amendment to the Constitution of the United States it is provided that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," &c.

Section 541 of the U. S. Revised Statutes divides the State of New York into three districts, to be called the Northern, Eastern and Southern Districts of New York, respectively. "The Eastern District includes the counties of Richmond, Kings, Queens, and Suffolk, with the waters thereof." As the waters of the ocean and Lower Bay of New York only wash the shores of Richmond, Kings, Queens, and Suffolk counties, this offense was committed, if at all, in the Eastern District of New York, and plaintiff in error had a constitutional right to a trial by an impartial jury of the Eastern District of New York, which was denied him.

U. S. *vs.* Bird, 1 Sprague, 299.
U. S. *vs.* Greiner, 14 L. Rep. N. S., 91.

II.

The statute is unconstitutional and void.

A.--Congress attempted to provided that one person should be punished for the crime of another, without any complicity in its commission.

Section 3 of the act requires that when prohibited matter is received on board of any scow, a permit shall be obtained defining the precise limits within which the discharge of such scow may be made, and makes any deviation "from such discharging place" a misdemeanor, *and the master and engineer of any tow-boat towing such scow shall be equally guilty of such offense with the master of the scow and be liable to equal punishment.*"

The indictment of Ansbro, in folios 12, 13 and 15, was laid under Section 3 of the Act, and in folio 15 he was charged with "deviating" from the discharging place, mentioned in the permit, "as he well knew." No intent to commit a crime was *charged or proven.*

The proof shows that if the crime was, in fact, committed, it was done by the masters of the two scows which were then about a thousand feet away from him (Fremont 54), and no proof was offered that Ansbro had even suggested the dumping of the scows at the time that they were dumped. On the contrary Vandecar, the only man on the supervisors vessel who was watching, neither saw nor heard any signal from the towing tug at all (Vandecar 62).

Ansbro did not "deviate," as he took his vessel

with her tow through the East Channel around through the dumping ground, passed the mud buoy, and returned to New York by way of the Coney Island channel, thus going about in a circle (Vandecar 63, O'Shaughnessy 67, Ansbro 73 74).

The engineer of the tug was necessarily attending to his duties at the engine and had even less control over the scows than the master of the tug. Yet without any participation whatever by either of them in the dumping of the scows, without intent to commit wrong, *and without power to prevent it*, the statute says they are equally guilty with the master of the scow who committed the crime, if it was committed.

(*b.*) Congress can exercise only the power delegated to it by the States, through the Constitution, and as by the common law no man could be punished for the crime of another without some participation in it, the act is unconstitutional and void, for want of power in Congress to make it.

Therefore *it attempts to deprive persons of their liberty or property (through imprisonment or fine), without due process of law*, which is expressly forbidden by the Constitution.

III.

The Supervisor of the Harbor has never prescribed the limits within which dumping should be FORBIDDEN, and therefore the statute has never taken effect, but remains dormant, waiting to be made a living thing by the action of the only person who can put it into operation.

By section one of the act certain waters are enumerated, and the supervisor is given power and authority to prevent the dumping of refuse in such parts of those waters, as in his discretion seems necessary to preserve the harbor of New York and its approaches.

It will be observed that dumping is not prohibited in those waters, but only in such parts of them as the supervisor shall expressly prescribe, in the exercise of a reasonable discretion.

These waters consist of the Hudson River, which is "tidal" as far up as Troy, a distance of over one hundred and forty miles; Long Island Sound, over one hundred miles long, and as deep in places as parts of the ocean; the East River; the Harlem River; Kill Von Kull; the Shrewsbury River; the Passaic River; the Hackensack River, and the Upper and Lower New York Bay.

If it had been intended that dumping should be prohibited in this vast body of water, parts of it so remote from New York Harbor as to have no effect whatever upon it, Congress would have said so in plain words.

If such had been the intention the condition in Section 1, as to fixing prescribed limits, would have been omitted, and the statute would have gone into immediate operation.

There seems to have been a total misapprehension of the very terms of the act, its purpose and meaning on the part of the present supervisor and his predecessors.

In the report of the case of *United States* vs. *The Sadie*, *41 Fed. Rep., 396, 397*, will be found the first prescription under the act, which shows an utter misconception of the statute, and the powers and duties of the supervisor.

It says: "By virtue of the authority vested in me as Supervisor of the Harbor of New York, the following limits are prescribed, as provided in the first section of the foregoing act: The deposit of refuse * * mud, &c. * * *must take place* east of the meridian 73° 55′ 56″ W. * * * and south of parallel 40° 31′ N., &c., WHICH IS EXACTLY THE OPPOSITE OF WHAT SECTION ONE OF THE STATUTE AUTHORIZED HIM TO DO, AND MEANT THAT HE SHOULD DO.

That case was an appeal from a decision of the District Judge for the Southern District of New York, one of the most learned and painstaking Judges on the Federal bench.

Exceptions to a libel filed under the fourth section of the Act were brought before him, and after a careful examination of the statute the exceptions were sustained and the libel was dismissed, for the reason that the statute had never been put in force by the supervisor.

The learned Circuit Judge fell into the same error as had the Supervisor, as his opinion shows, and reversed the judgment of the District Court.

The case of the *Sadie* (*supra*), was distinguished in the later case of *The G. L. Garlick*, *45 Fed. Rep.*, *380*, *383*, decided by the District Court for the Northern District of New York.

While the ingenious argument of the learned District-Judge, in drawing the distinction, accomplished its object, a careful reading of it leaves the impression that it is something in the nature of spelling a way out of an untenable position forced upon that Court by the decision of the Circuit Court in the Sadie case.

This impression is strengthened by the clear,

forcible and straightforward logic of the opinion at pages 381, 382 and 383, which leaves little to be said on this branch of the case.

No other decision of cases brought under this act have been found.

Sections two and three of the act require that when prohibited matter is loaded in vessels to be towed to a place of deposit, then permits for such deposit shall be obtained from the supervisor, which shall prescribe the *precise limits* where such deposit may be made.

Section one contemplates the fixing of certain permanent prescribed limits within which no dumping shall take place, while sections one and two make the fixing of limits within which dumping may take place outside (*outside those limits*) a matter of special permit, which might be changed from time to time as occasion might require.

The requirement of section one is a *condition precedent* to the operation of the statute, while the requirements of sections two and three are matters of detail, of every-day performance.

As the condition has never been complied with, the statute remains inoperative,

State *vs.* Parker, 26 Vt., 327.

Insurance Company *vs.* Welch, 29 Kan., 672.

Home Ins. Co. *vs.* Surgert, 104 Ills., 653.

23 Am. & Eng. Encyclopœdia of Law, pp. 221, 222, section 6 and cases cited.

IV

The permit issued by the supervisor did not define "*the precise limits within which the discharge of such scows or boats may be made*," as required by section three of the act.

A single white spar buoy was placed in the wide expanse of ocean, one and a-half miles from the nearest shore, and the master of the scow was informed that he must deposit the material "south and east," and within half a mile of that buoy, under pain of fine and imprisonment; and yet no buoy or other mark was placed at any point to define that half mile limit, nor was there any bearing or range given as a guide to the whereabouts of that imaginary line which should describe the sides of the quadrilateral and the segment of a circle (Fremont, 47, 48).

If any proof other than common experience were needed that there were no *precise* "limits fixed by the permit, it was furnished by the testimony of Lieutenant Fremont, a line officer of the United States Navy, and assistant supervisor of the harbor. He was on the government vessel on the day in question, which at the time the scows were first sighted, was proceeding to the eastward from Norton's Point, and running parallel with Coney Island shore (Fremont, 49, 52; Vandecar, 59, 61). He could tell nearly exact distances along shore, but when he looked seaward towards the mud buoy and beyond, there was nothing to aid in forming an estimate of distances. He was at that time two miles from the mud buoy as was afterwards ascertained from the chart (Fremont, 49, 50, 52) but when asked on the preliminary

hearing before the U. S. Commissioner how far he was from the mud buoy, he said he was "about one mile or one mile and a quarter from it" (Fremont, 54, 55). This shows how utterly unreliable such limits are, either for the purpose of lawfully depositing material, or proving a violation of the statute.

By the common law such deposit of mud, &c., is no crime; yet under this statute as it now stands and the permits issued under it, any man engaged in towing or depositing this material may, without fault on his part, by a mistake of fact in judging distances or direction, become a criminal, and be sentenced to one year's imprisonment. With best intentions, if he should deposit material one foot outside any one of three imaginary lines, he is a criminal. One foot inside and he is safe.

The witnesses for the prosecution admitted that they were merely "guessing" at the distance at which the scows were from the buoy when they dumped (Fremont, 49-52, 54, 55; Vandecar, 61), and Fremont at the same time guessed his own distance from the buoy at a mile to a mile and a quarter, when it was, in fact, two miles.

The plaintiff in error stands to-day convicted of a crime upon these guesses under this statute.

It cannot be possible that this Court will sanction such trifling with the liberty of any man, simply through the neglect or stubbornness of a public official who fails to do his plain duty, while acting under a statute which requires *precise* limits to be fixed, when those limits could be fixed with precision, by placing buoys at the several angles of the triangle, or by some other equally simple method.

The word "precise" was used purposely in

wording the statute, which is criminal, and in derogation of common law rights, and by the well settled rules of statutory construction must be construed strictly.

Worcester defines it as as follows :

"Precise—limited; determinately; exact; nice; scrupulous; strict; definite; accurate; correct."

Under the word "accurate" is found this note, "Syn. *accurate* and *correct* are not as as strong terms as *exact* and PRECISE."

Worcester's Unabridged Dictionary, 1889.

Webster defines it in still stronger terms, and in the note under word "accurate" makes it still more clear that the meaning of the word leaves nothing uncertain or equivocal.

Webster's Unabridged Dictionary, 1890.

The limits attempted to be fixed by the permit issued by the supervisor falls far short of being "precise," under these definitions, and the penal provisions of the statute cannot be applied until they are made so.

U. S. *vs.* Sharp, Pet. C. Ct., 118.

The Court erred in refusing to instruct the jury to acquit the defendant on such testimony as to the dumping limits, and committed a graver error in charging them that the regulations gave a "sufficient description of the place," and that the burden was upon any one undertaking to "dump mud down there," "to know whereabouts to

dump," and to "be sure to know he is within the authorized limits when he dumps" (Charge, 82, 83).

The burden is upon the supervisor to furnish certain and *precise* information, and the burden is shifted only when that is done.

V.

It was not proven that John Ansbro violated the statute.

The second count of the indictment under which he was convicted, charged three things:

FIRST.—That the steam tug P. H. Wise was knowingly engaged, used and employed by him, he being then the master thereof (indictment 14).

This constitutes no crime. Section 2 of the Act contemplates the towing of prohibited matter by a tug boat, with guilty knowledge on the part of her master that it would be discharged in a forbidden place, and therefore with intent on his part to aid in a crime.

No such *guilty* knowledge is charged against Ansbro, *nor is it charged in the indictment that he did tow.* The charge that he had a permit in his possession allowing him to tow is not a charge that he did tow.

As no crime was charged under the second section the conviction cannot be sustained under it.

SECOND.—That the mud was discharged from the two scows by his direction "into the tidal waters of the harbor of New York and its adjacent and tributary waters" (indictment 14).

If this charge had been proven it would still constitute no crime. Section 1 prohibits the discharge of such matter in those waters *within the limits to be fixed by the supervisor*; but the indictment does not allege that those limits have ever been fixed by the supervisor, and the proof is that they were never fixed.

But the charge was not proven. The tug was about a thousand feet away from the nearest scow (Fremont 54), and there is absolutely no evidence that Ansbro gave any "direction" to the master of the scow. Vandecar, the master of the government boat said that he neither saw nor heard any signal from the *Wise* (Vandecar 62).

THIRD.—That the place where such mud was deposited was not at the dumping place specified in the permit, but "deviated" from it, as Ansbro well knew.

This charge is made under Section 3 of the act, which requires the owner or master of a *scow* having prohibited matter on board to obtain a permit defining the precise limits of the place of discharge, and making it a misdemeanor to "deviate" from that place.

This section further provides that "the master and engineer of any tow-boat towing such scow shall be equally guilty with the master of the scow."

The only evidence in the case is directed to uphold this charge. If the testimony of the government's two witnesses outweigh the testimony of three witnesses for the defense, then there was a "deviation" and the dumping did not take place in the limits intended to be fixed by the permit.

Fremont and Vandecar saw the scows loaded and in about fifteen minutes afterwards saw them light.

They thought the scows were not within dumping limits, but admitted that there was no definite means of knowing. They admitted that their statements were mere guess-work, and Fremont's absolute inability to form a correct estimate was shown when he mistook his own distance from the buoy by three-quarters of a mile or a mile in a distance of only two miles. The scows were on the other side of the buoy from him, almost in a direct line.

Ansbro, Eckhoff, his deck-hand, and O'Shaughnessy, an inspector on the supervisors vessel, all testified that the dumping was done within limits, and their testimony was based upon estimates formed in the same way, by measuring with the eye, in the absence of any buoy or marker defining the limits.

The guess of these three men is surely as good as that of the other two, one of whom had disqualified himself.

But even if the Court should allow such flimsy evidence as this, to fasten a crime upon a man, it can only be done by showing that the permit issued by the supervisor did in fact fix the *precise limits* of the dumping ground. The discussion of that subject in Point IV, shows clearly that it did not, and therefore no conviction of the master of the scow could be had, lawfully, under it.

The charge against Ansbro under Section 3, was not as a principal, however, but as an accessory after the fact. He could not have knocked out the pawl on the dumper, as he was a thousand feet from her. *But he was the master of the tug which towed her, and that made him guilty, under the statute, if a crime was committed by the master of the scow.*

All the testimony is to the effect that the tug passed through exactly the same waters that she always did, and towed the scows the same way, passing directly through the dumping ground and near the mud buoy. There was no "deviation" from her course, for she went to the place designated in the permit.

If the mud was dumped in some other place on the way to the limits, without his knowledge, or against his protest or positive orders, and that should be held to be a "deviation," he would be equally guilty as if he had instigated or directed it. Even if he were on board the scow and used physical force to prevent unlawful dumping, if he were unsuccessful, he would be equally guilty with the man who might knock him down in order to accomplish it.

A statute which attempts to make a man a criminal, because another person has committed a crime, is an absurdity, and is clearly unconstitutional as shown in Point II.

The burden of proof was on the prosecution, as the presumption of innocence continues until guilt is established by evidence.

(Story, J.) U. S. *vs.* Gooding, 12 Wheat., 460.
State *vs.* Johnson, 91 Mo., 439.
People *vs.* De Fore, 7 West. Rep., 886.

The evidence for the prosecution did not prove the guilt of the defendant, and the Court erred in not directing his acquittal at the close of the government's case, and again at the close of the whole case, as requested (fols. 65, 81).

VI.

The Circuit Court committed errors in several charges and refusals to charge aside from those already noticed.

It was error to charge the jury that the Supervisors' permit contained "a sufficient description" of the dumping place (Charge, fol. 82). That was a question of fact for the jury to decide.

It was error to charge the jury that they could supply the lack of motive for the commission of the offense, by the supposition that "although there is no evidence of it, we may say that the reason why they do not dump at the required place is because they gain time by dumping short" (Charge, fol. 88).

Neither Court nor jury may substitute suppositions for evidence, and it was gross error, to say the least, for the Court to suggest anything to the jury in aid of the prosecution and against the prisoner. It is against the spirit of our laws and institutions, and should not be tolerated.

It was error to refuse to charge that the jury should not consider the necessities of commerce which caused this law to be passed, if they were not satisfied beyond a reasonable doubt, from the Government's case, that the offense had been committed by the defendant (89, 90).

The Court had lain great stress upon the necessity of this law, at fols. 82 and 88, and to the "immense damage done there." This tended to prejudice the jury against the defendant, and that prejudice should have been removed.

It was error not to require the prosecution to elect on which count of the indictment it would rely.

VII.

It is respectly submitted that the Circuit Court had no jurisdiction of the subject matter or of the person; that the statute is unconstitutional and void; that it was never put in force by the supervisor; that the permit issued by him did not comply with the statute; that the indictment was insufficient; that no evidence amounting to proof of the commission of a misdemeanor by John Ansbro was offered; and that the judgment of the Circuit Court should be reversed and the plaintiff in error discharged.

James Emerson Carpenter,
John F. Foley,
Albert A. Wray.